Supreme Court, U.S.
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Case No. 94-476

IN THE

Supreme Court of the United States

October Term, 1994

HONORABLE NATH C. DOUGHTIE
AND HONORABLE KARL B. GRUBE,
Petitioners,

v.

FLORIDA DEPARTMENT OF STATE,
JIM SMITH, SECRETARY,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The respondent would restate the questions presented as follows:

> 1. May the State of Florida, consistently with the First and Fourteenth Amendments, and *Buckley v. Valeo,* 424 U.S. 1 (1976), increase the filing fee for candidates for judicial office from 3% to 4.5% of the annual salary of the office, which filing fee is placed in the state's General Revenue Fund, and then appropriate money from General Revenue to the Election Campaign Financing Trust Fund for distribution to qualifying candidates for statewide political offices?
>
> 2. What standard of judicial scrutiny applies to candidates' filing fees, the proceeds of which are placed in the state's General Revenue Fund to be appropriated for a variety of purposes, when payment of that fee is essentially voluntary because candidates have other reasonable means of qualifying for the ballot?

Respondent's reasons for restating the questions presented are explained in the Statement of the Case, *infra.*

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STATEMENT OF THE CASE

The two questions presented by the petitioners are not only argumentative but embody a legal conclusion that neither the district court nor the court of appeals accepted. Each of the questions petitioners present assumes that Chapter 91-107, Laws of Florida (1991), "was enacted for the specific purpose of raising revenue to fund the partisan political campaigns of candidates for the elective offices of Governor and Executive Cabinet by imposing a substantial monetary filing fee [on judicial candidates]." (Petition, p. i) Reasonable candidate filing fees serve many recognized purposes, however, and petitioners do not contend that the judicial candidates' filing fee does not serve such purposes. Furthermore, payment of the filing fee in Florida is not mandatory as judicial candidates have other reasonable means of ballot access. Respondent has therefore restated the questions presented.

Chapter 91-107, section 5, Laws of Florida (1991), amended section 105.031, Fla. Stat., by adding the following underscored language:

> 105.031 Qualification; filing fee, candidate's oath. —
>
> (3) QUALIFYING FEE. — Each candidate qualifying for election to judicial office, except write-in judicial candidates, shall, during the time for qualifying, pay to the officer with whom he qualifies a qualifying fee, which shall consist of a filing fee and an election assessment, or qualify by the alternative method. The amount of the filing fee is *4.5* ~~3~~ percent of the annual salary of the office sought. The amount of the election assessment is 1 percent of the annual salary of the office sought. The qualifying officer shall forward all filing fees to the Department of Revenue for deposit in the

> General Revenue Fund. *One-third of all filing fees deposited into the General Revenue Fund shall be subsequently transferred to the Election Campaign Financing Trust Fund.* The election assessment shall be deposited into the Elections Commission Trust Fund. The annual salary of the office for purposes of computing the qualifying fee shall be computed by multiplying 12 times the monthly salary authorized for such office as of July 1 immediately preceding the first day of qualifying. The subsection shall not apply to candidates qualifying for retention to judicial office.

Payment of the filing fee is *voluntary.*[1] As a result of the 1991 amendment, judicial candidates who *choose* to pay the filing fee must pay an amount equal to 4.5% of the annual salary of the office rather than 3%. All of the filing fees are deposited into the state's General Revenue Fund. Then, by law, an *amount* equal to one-third of the filing fees is appropriated *from the General Revenue Fund* to the Election Campaign Financing Trust Fund. According to petitioners, this is an appropriation of "their" filing fees, not general revenue money.

Judicial filing fees have varied in Florida over the years. In 1971, the law provided for judicial candidates to pay a flat 5% filing fee, all of which was placed in General Revenue. Section 105.031(3), Fla. Stat. (1971). In 1977, the filing fee was reduced to 3%. *See* Chap. 77-175, section 36, Laws of

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1 The district court struck the statutory requirement that judicial candidates wanting to qualify by the petition method of collecting signatures had to file an oath to the effect that paying the fee would impose an undue burden on their resources. (Pet. App. 2a, 12a-17a) As a result, a judicial candidate may qualify for the ballot by paying the total qualifying fee *or* by collecting sufficient signatures. The judicial candidate may qualify by using the alternative petition method irrespective of his or her financial resources.

Florida (1977), amending section 105.031(3), Fla. Stat. In 1989, section 105.031(3) was amended to provide for a filing fee of 3% and an election assessment of 1%. Again, the 3% filing fee was deposited in the General Revenue Fund and the 1% election assessment was directed to the Elections Commission Trust Fund. *See* Chapter 89-338, section 35, Laws of Florida (1989).

Chapter 91-107, section 5, Laws of Florida (1991), as set forth above, simply increased the filing fee from 3% to 4.5%, less than it was in 1971, and continued the long-standing practice of depositing the fees in the General Revenue Fund.

In their argument petitioners state the following conclusion of law and fact:

> [T]he fees challenged herein...were not imposed or used to regulate or conduct the non-partisan judicial elections in which they participated, but were imposed and used to finance the partisan political campaigns of candidates for Governor and executive Cabinet. In short, the challenged fees were not imposed or used by the state to defray the state's cost of running any election, but were used by political candidates in other elections to pay for their partisan political campaigns.

(Petition, p. 10)

Neither the district court nor the court of appeals agreed with this. As pointed out, the entire amount of the filing fee is deposited in the state's General Revenue Fund. Petitioners do not question the propriety or constitutionality of depositing fees in the General Revenue Fund, money from which is ordinarily appropriated to support a wide variety of needs and programs.

Although the complaint alleged that judicial filing fees could be used only to regulate or defray the costs of judicial

elections, petitioners submitted no evidence as to the expenses the state routinely bears in the administration and enforcement of the election laws, judicial or otherwise. In fact, the division of elections of the department of state has myriad elections-related responsibilities under chapters 97, 98, 99, 100, 101, 103, 104, 105 and 106, Fla. Stat., and respondent established by affidavit that for the fiscal year 1991-1992 the Florida Legislature appropriated $2,403,139.00 from the General Revenue Fund to the division of elections to carry out its many responsibilities. Petitioners do not explain how they now determine that appropriations to the division of elections from the General Revenue Fund come from one source rather than another or are used for some purposes but not others.

On the basis of the foregoing facts, the district court ruled the existence of the filing fee and its amount passed constitutional muster and that petitioners' challenge was simply to an appropriation of money from the state's General Revenue Fund. The challenge was barred under *Buckley v. Valeo,* 424 U.S. 1 (1976). (Pet. App. 7a) The court of appeals affirmed. (Pet. App. 1a)

Both petitioners claim they are continuing their challenge to the now voluntary filing fee because part of the remedy they seek is to have the state reimburse them the 1.5% increment in the filing fee. (Petition, pp. 4, 5) Their complaint, even as amended, did not seek reimbursement of any portion of the filing fee. It asked only for a ruling that the 4.5% filing fee was unconstitutional in its entirety. Petitioners' specific claim that they sought reimbursement as a remedy in the lower court (Petition, p. 5) is not supported by reference to the record or to any pleading.

SUMMARY OF ARGUMENT

The judicial candidates' filing fee in the amount of 4.5% of the annual salary of the office is plainly reasonable and constitutional under the case law and has not been challenged in this case as unnecessary to deter frivolous candidacies. The petitioners' challenge, as the court of appeals recognized, is to an appropriation of general revenue money to the Election Campaign Financing Trust Fund. This case is therefore indistinguishable from *Buckley v. Valeo,* 424 U.S. 1 (1976), wherein this Court ruled that taxpayers could not challenge appropriations from general revenue money to support qualifying candidates in presidential election campaigns. Moreover, judicial candidates in Florida can choose not to pay the filing fee; they may qualify by the petition method of collecting signatures if they wish.

Because the filing fees are deposited in the state's General Revenue Fund, it is not possible to say that any fee-generated dollar necessarily goes to the Election Campaign Financing Trust Fund. The statutory reference to one-third of the filing fees merely determines the amount of the appropriation. General revenue money supports many elections-related responsibilities of the State, particularly those of the department of state, division of elections. The money used to support the division of elections could just as easily be filing fee money. The petitioners have no recognized right to attempt to trace the use of money from a lawfully imposed fee through the appropriations process on the ground that their First Amendment interests as candidates are infringed if the filing fee is not used for the sole purpose of defraying the costs of the election in which they are running. Moreover, the argument that filing fees must be limited to the administrative costs of holding the election ignores the fact that the division of elections receives an annual appropriation

of $2.4 million from general revenue for its election-related responsibilities.

The petition fails to address any of the considerations of Supreme Court Rule 10.1 and does not attempt to show that the decision of the court of appeals conflicts with a reported decision of any court.

The applicable standard of judicial scrutiny, assuming an essentially voluntary filing fee must be further examined after *Bullock v. Carter,* 405 U.S. 134 (1972), is clearly established in *Bullock v. Takushi,* ____ U.S. ____, 112 S.Ct. 2059, 2063 (1992), and *Anderson v. Celebrezze,* 460 U.S. 780 (1983). There is no uncertainty or conflict to be resolved as to the appropriate standard of scrutiny, and therefore the second issue presents no basis for this Court to grant review. *See* Supreme Court Rule 10.1.

ARGUMENT

I. THE STATE MAY CONSTITUTIONALLY APPROPRIATE MONEY FROM ITS GENERAL REVENUE FUND, PART OF WHICH IS OBTAINED FROM THE FILING FEES OF JUDICIAL CANDIDATES, TO IMPLEMENT THE ELECTION CAMPAIGN FINANCING ACT.

Petitioners' argument acknowledges the controlling decisions of this Court that uphold candidate filing fees. *See Bullock v. Carter,* 405 U.S. 134 (1972), and *Lubin v. Panish,* 415 U.S. 709 (1974). The only limitation on candidate filing fees is that they be reasonable in amount and that those who cannot afford to pay them have an alternative means of qualifying for the ballot. One of the critical purposes filing fees serve is to control ballot access. Filing fees help to deter frivolous candidates, avoid overcrowded ballots and voter confusion, and ensure that the winner is the choice of a majority or at least a strong plurality. *Bullock,* 405 U.S. at 142; *Lubin,* 415 U.S. at 715. A filing fee is also justified in that it can help defray the costs of elections. *Bullock,* 405 U.S. at 147.

Petitioners cite not one case, and none is known to respondent, holding that a filing fee on the order of 4.5% of the annual salary of the office does not serve precisely the above functions. In fact, the Fifth Circuit Court of Appeals, the Eleventh Circuit's antecedent court, relying on *Bullock* and *Lubin,* long ago upheld a Florida law imposing a 5% filing fee on judicial candidates. *Adams v. Askew,* 511 F.2d 700, 701-703 (5th Cir. 1975). As the district court stated in finding the current filing fee constitutional, the issue presented here had been "raised before and rejected." (Pet. App. pp. 4a, 6c.)

Consequently, petitioners do not directly challenge the filing fee as such but rather claim that the incremental increase from 3% to 4.5% authorized by the 1991 law serves no "proper function." (Petition, p. 11) They maintain here, as they did below, that the increase serves no purpose other than to fund the campaigns of partisan political candidates through its appropriation to the Election Campaign Financing Trust Fund.

This argument fails for several reasons. First, a filing fee of 4.5% for judicial candidates can be presumed to have the effect of regulating ballot access and deterring frivolous candidacies, particularly in the absence of any contention that 4.5% is excessive as a ballot control measure. It was never the state's burden to prove that a reasonable filing fee of 4.5% correlates with exactly the right degree of ballot control, *see Munro v. Socialist Workers Party,* 479 U.S. 189, 194, 195-196 (1986), especially where, as here, a plaintiff declines to specifically plead such a challenge.[2]

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2 As the Court stated in *Munro:*

> We have never required a State to make a particularized showing of the existence of voter confusion, ballot overcrowding, or the presence of frivolous candidacies prior to the imposition of reasonable restrictions on ballot access.
>
> * * * *
>
> To require States to prove actual voter confusion, ballot overcrowding, or the presence of frivolous candidacies as a predicate to the imposition of reasonable ballot access restrictions would invariably lead to endless court battles over the sufficiency of the "evidence" marshaled by a State to prove the predicate. Such a requirement would necessitate that a State's political system sustain some level of damage before the legislature could take corrective action. Legislatures, we think, should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively, provided that the response is reasonable and does not significantly impinge on constitutionally protected rights.

479 U.S. at 194, 195-196.

Second, section 105.031 plainly requires that the filing fee be deposited in the General Revenue Fund. The legislature appropriates money from that fund for any number of purposes. One purpose is to support the division of elections which has numerous responsibilities relating to administration and enforcement of the election laws. The legislature also appropriates general revenue money to support the Elections Campaign Financing Trust Fund. It is not logically possible to conclude, as petitioners so blithely do, that the money going to the Trust Fund is "their" filing fees. It could as well represent the tax dollars of others. It is just as logical to conclude that petitioners' filing fees are part of the appropriation to the division of elections used to defray elections costs.

Because a 4.5% filing fee is proper *as such* petitioners have no right to challenge the use to which they contend the fees are put. This was exactly the point made in *Buckley v. Valeo,* 424 U.S. 1 (1976). In *Buckley* this Court considered a challenge brought by taxpayers to the use of tax money for financing presidential election campaigns. In rejecting the taxpayers' argument, the Court said:

> Appellants' challenge to the dollar check-off provision (§6096) fails for the same reason. They maintain that Congress is required to permit taxpayers to designate particular candidates of parties as recipients of their money. *But the appropriation to the Fund in §9006 is like any other appropriation from the general revenue except that its amount is determined by reference to the aggregate of the one- and two- dollar authorization on taxpayers' income tax returns.* This detail does not constitute the appropriation any less an appropriation by Congress. *The fallacy of appellants' argument is therefore apparent; every appropriation made by Congress*

uses public money in a manner to which some taxpayers object.

Id. at 91-92 (emphasis added). In two footnotes to the quoted paragraph the Court against emphasized that "[t]he §6096 check-off is simply the means by which Congress determines the amount of its appropriation," *id.* at 94 n. 124, and "Congress need not provide a mechanism for allowing taxpayers to designate the means in which their particular tax dollars are spent." *Id.* at 92 n. 125.

Because the 4.5% filing fee is proper in itself, it is *owed* by judicial candidates who choose to pay it rather than qualify by the petition method, just as the tax money in *Buckley* was owed by ordinary taxpayers. The filing fees are placed in the General Revenue Fund (as they have been for decades) just like most tax revenues. The legislature determines the *amount* of the appropriation to the Trust Fund by reference to a fraction—that is, one-third—of the filing fees. That fraction, like the dollar check-off provision in *Buckley,* is simply the means to determine the amount of the appropriation. Judicial candidates have no more right to object to appropriations of general revenue money than did the taxpayers in *Buckley.*

Petitioners' argument, logically extended, would mean that the legislature cannot constitutionally use any general revenue money to support the Trust Fund. *Any* appropriation of general revenue to the Trust Fund—whether by dollar amount or by reference to some fraction of the filing fee—would be in whole or in part "their" money designated to support partisan candidates. Of course, if petitioners are entitled to this objection on First Amendment grounds it would follow that any taxpayer whose tax dollars go into general revenue would be entitled to object to having to support the partisan campaigns of candidates he would prefer not to support. But *Buckley* expressly rejected such

an argument and approved public financing of presidential campaigns, stating that public financing "furthers, not abridges, pertinent First Amendment values." 424 U.S. at 92-93. *See also First National Bank of Boston v. Bellotti,* 435 U.S. 765, 788-789 (1978) (preventing corruption and the appearance of corruption in the electoral process are state interests "of the highest importance"). This being true, the Florida Legislature's appropriation of general revenue money to the Trust Fund does not violate any First Amendment interest of the petitioners or of taxpayers in general.

Third, petitioners seem to contend that their filing fees can be constitutionally appropriated only "to regulate or conduct the election [in] which the aspirants desired to participate...." [Petition, p. 13] Petitioners offered no evidence to establish the cost of administering judicial elections or enforcing election laws. They therefore cannot assert that the amount of the filing fee is disproportionate to the costs of administration and enforcement. It is too late in the day for petitioners to raise this issue. In any event, money being fungible, the $2.4 million yearly appropriation of general revenue money to the division of elections could as well be deemed to include all filing fees deposited in the General Revenue Fund.

Moreover, it must be kept in mind that one of the most important functions of a filing fee, wholly apart from any use made of the money, is to control and limit ballot access. It follows that a fee must be substantial enough to deter frivolous candidacies even if it exceeds administrative costs. This Court's decisions have never suggested the amount of a candidate's filing fee must be limited to the state's (or local government's) administrative costs.

Finally, petitioners' reliance on *West Lynn Creamery, Inc. v. Healy,* ___ U.S. ___, 114 S.Ct. 2205 (1994), is inapposite. That decision, applying the negative Commerce Clause,

held that Massachusetts could not impose an assessment (in effect, a tax) on milk from both in-state and out-of-state producers to create a special fund used to subsidize only Massachusetts dairy farmers.

The *Buckley* decision, however, would clearly permit a state to use its general revenue money to fund election campaigns. Unlike the fund created in *West Lynn Creamery,* Florida's General Revenue Fund consists of money from a variety of taxes and fees, including judicial filing fees. The reference to one-third of the filing fees determines only the amount of an appropriation. Moreover, under section 106.32(1), Fla. Stat., in each year which a general election is held the legislature must augment the Election Campaign Financing Trust Fund with money from general revenue sufficient to fund *all* qualifying candidates. Clearly, the Trust Fund used to assist qualifying political candidates consists of *everyone's* money.[3] Judicial candidates can avoid contributing to general revenue, if they find appropriations therefrom objectionable, by qualifying by the petition method.

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3 Section 106.32, Fla. Stat. (1993) provides:

> 106.32 Election Campaign Financing Trust Fund. -
> (1) There is hereby established in the State Treasury an Election Campaign Financing Trust Fund to be utilized by the Department of State as provided in §§ 106.30-106.36. *If necessary, each year in which a general election is to be held for the election of the Governor and Cabinet, additional funds shall be transferred to the Election Campaign Financing Trust Fund from general revenue in an amount sufficient to fund qualifying candidates pursuant to the provisions of §§ 106.30-106.36.*
> (2) Proceeds from filing fees pursuant to §§ 99.092, 99.093, and 105.031 shall be deposited into the Election Campaign Trust Fund as designated in those sections.
> (3) Proceeds from assessments pursuant to §§ 106.04, 106.07, and 106.29 shall be deposited into the Election Campaign Financing Trust Fund as designated in those sections.

(Emphasis added.)

II. THE PETITIONERS' SECOND QUESTION PRESENTS NO ISSUE THAT WOULD WARRANT THE EXERCISE OF THIS COURT'S DISCRETION TO GRANT REVIEW; THE SECOND QUESTION IS INHERENT IN THE FIRST AND PETITIONERS POINT TO NO CONFLICT AMONG DECISIONS FOR THIS COURT TO RESOLVE.

Only two years ago this Court reiterated that "the mere fact that a State's system 'creates barriers...tending to limit the field of candidates from which voters might choose...does not itself compel close scrutiny.' " *Burdick v. Takushi,* ____ U.S. ____, 112 S.Ct. 2059, 2063 (1992) (quoting *Bullock v. Carter,* 405 U.S. 134, 143 (1972)). Instead, as *Burdick* again made clear, it is the "flexible standard" set forth in *Anderson v. Celebrezze,* 460 U.S. 780 (1983), that applies in weighing asserted injury to rights protected by the First and Fourteenth Amendments. 112 S.Ct. at 2063. While it would be necessary to apply the *Anderson* standard should the Court grant review, there is no uncertainty or conflict among decisions as to what that standard is that would warrant this Court's review of the decision below. *See* Supreme Court Rule 10.1. *Brown v. Hartlage,* 456 U.S. 45 (1982), does not furnish that conflict. *Brown* did not involve state measures that limited the field of candidates but rather direct restrictions on the ideas offered by candidates. Those restrictions were appropriately subject to close scrutiny.

Moreover, as petitioners have framed the issue and their argument, they wholly ignore the fact that judicial candidates do not have to pay the filing fee to qualify. Their question misstates this fact by insisting the fee is "imposed." As explained above, judicial candidates have another reasonable method by which they may qualify *and* avoid the "burden" of which petitioners complain.

CONCLUSION

Petitioners fail to demonstrate any basis for this Court to grant a writ of certiorari or even to distinguish this case in any way from *Buckley v. Valeo*. Accordingly, the Court should deny the petition.

Respectfully submitted,

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